UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BLACKWATER LODGE AND TRAINING CENTER, INC.,	Case No. 08CV0926-H(WMC)
Plaintiff,	San Diego, California
vs.	Friday, May 30, 2008 1:30 p.m.
BROUGHTON, et al.,	
Defendants.	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE MARILYN L. HUFF
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by electronic sound recording; transcript produced by transcription service.

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SAN DIEGO, CALIFORNIA FRIDAY, MAY 30, 2008 1:30 PM

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(Call to order of the Court.)

THE CLERK: Two on calendar, 08CV926, Blackwater Lodge and Training Center, Inc. versus Broughton, et al. for motion hearing.

THE COURT: State your appearances for the record.

MR. NEIL: Yes, your Honor. Can you hear me okay speaking up here?

THE COURT: Yes.

MR. NEIL: Mike Neil for Blackwater, Neil, Dymott, Frank, McFall & Trexler, your Honor.

MR. NADOLENCO: John Nadolenco on behalf Blackwater. I'm with the firm Mayer, Brown.

MR. CHINE: I'm Jeff Chine with Luce, Forward, Hamilton & Scripps on behalf of Blackwater.

THE COURT: Thank you.

MR. McGRATH: Don McGrath and Walter Chung on behalf of the City and the other Defendants.

THE COURT: Thank you.

The parties in the previous case have some technical equipment to take down, so that they wanted to know for their planning purposes, what is your reasonable time estimate for argument?

MR. NEIL: Your Honor, I assume it depends upon the questions the Court may have and how much time the Court would allow us, but this should not take long. I think it's been well briefed. Did the Court receive our reply?

THE COURT: I did. And I've read it.

MR. NEIL: All right. Thank you, your Honor. I think speaking for Blackwater, your Honor, 20 -- 20 minutes on opening. And I'm not sure what the City Attorney might plan.

MR. McGRATH: I don't know what they're going to say, so I'll just respond to whatever they say in probably 10, 15, your Honor.

THE COURT: All right. So if we have them come back in an hour and a half, that would probably work. All right. You may proceed.

The Court has reviewed the papers that are submitted. And you may make your argument.

MR. NEIL: Thank you, your Honor. I want to step to the podium here. And if I may, your Honor, I requested permission of the Court to bring a recording device, and I'd like to play something. It's a talk from the Mayor of San Diego on the Roger Hedgecock show last night on radio station 600. And I told Mr. McGrath that I intended to play this.

And basically -- and I have a transcription of this, your Honor, where the Mayor says in response to a question that Blackwater met all of the permit requirements required.

MR. CHUNG: Your Honor, we would object. He's asking to play the recording. Now he's actually telling you what the recording says. We would object. That's hearsay, and it's also prejudicial. If they wanted the mayor to come in to testify about that, they should have made arrangements or got a declaration. But the Mayor has said many things about this situation. So listening to one recording about something he said would be prejudicial as well as hearsay.

MR. NEIL: I didn't intend to --

THE COURT: Just a second. On hearsay, overruled. On prejudicial, overruled. You may play it.

MR. McGRATH: Your Honor, I'd add foundation to that too. I mean, I don't know what this is. I've never seen it. I don't know whose voice I'm going to hear.

THE COURT: Do you have a transcript? This is a TRO requested. TROs are on short notice.

MR. McGRATH: Yes.

THE COURT: And so if you have a transcript that you could give over to the other side, that would be helpful. And if you have one for the Court, that would be helpful. And then you could renew all of your objections.

MR. McGRATH: Thank you, your Honor.

(Playing audio tape.)

MR. NEIL: Your Honor, I'm going to have to have somebody with more technical expertise than I have to turn this recording device on for me. May I ask Mr. Vanderwitt (phonetic) to step forward to do that, please?

THE COURT: You may.

MR. NADOLENCO: I was going to give it a shot, but that's dangerous.

(Playing audio tape.)

"Well, first of all, the original decision was ministerial. We get probably 60-, 70,000 permit requests every single year. So if you think the Mayor can know every one of those, that's absolutely ridiculous. When this did come to my attention, I asked just to make sure that it followed the correct guidelines. The City Attorney raised some additional issues. I don't know. I'm not an attorney and unfortunately operate in a world where I don't get legal advice normally. But this will be settled tomorrow. They're going to court tomorrow. The City Attorney will have to present his opinion.

"I believe it was properly
permitted, so the decision comes down to
whether there are any legal issues, and
the City Attorney is going to have to
take that up tomorrow in court, and the
Court is going to make that decision
rather quickly so that we can issue the
permits if they're legal and lawful.
And that's exactly what we'll do."

THE COURT: And you have a transcript of that?

MR. McGRATH: Your Honor, the transcript given to me did not have the first paragraph of the Mayor saying ministerial. That was not on this.

MR. NEIL: And I apologize if it doesn't have that on there, your Honor. We can add that.

THE COURT: Well, the benefit of this is we're on recording equipment, so you can get a copy of the tape in I think an inexpensive fashion. I think it's $25 or some inexpensive request.

MR. NEIL: Your Honor, what we have here is an issue that would never have come up, had not for whatever reasons -- and I don't want to get into a political discussion here --

THE COURT: Nor does the Court.

MR. NEIL: And I appreciate that.

THE COURT: I review it on the law.

MR. NEIL: But nevertheless, the City Attorney, after Blackwater, through its contractor, had applied for the appropriate permits and had been permitted all the way. We have a firing range down there, your Honor, that's state of the art. I visited it, and I've seen it.

We have a mockup which is another separate issue in this case which is basically container crates that are used on board ships that have had some holes cut in them and some port holes and a couple of doors so sailors with plastic pistols can go through there and pretend like they're searching for terrorists, et cetera.

THE COURT: But the ship simulator -- that's what I call the ship simulator. That's not really before the Court.

MR. NEIL: It's another issue, and I'll keep it out of here, but I'm just trying to point the flavor.

THE COURT: It's a side issue as opposed to whether the certificate of occupancy should issue for the present. If there's some other permits or other things that need to happen for the ship simulator, that's a separate issue.

MR. NEIL: And I agree with that exactly, your Honor. And I appreciate that. And of course we have office space for teaching sailors. The basic -- basically, this course that we've contracted with the Navy -- and we have a longstanding relationship with the Navy over the years. The same course is offered on the East Coast, but it's much more economical, time-saving sailor's time to offer the course here. It's just basically a self-defense course so sailors on board ships can defend themselves if terrorists attack or the ships are attacked and they can defend the ships and defend themselves, essentially defending our country.

The permitting process went extremely smoothly, no problems. If the Court had the opportunity to note that even in the exhibits attached to the Defendant's response to our ex parte request, those exhibits reflect at numerous places that a firing range was anticipated, that this was going to be a training facility.

And all permits were granted, and everything was fine up through and including May 16th, when the City Attorney's Office issued a -- if your Honor is looking at the exhibits, I would -- for example, in the reply brief, a response, for example, at Exhibit C -- and this is in the Defendants' opposition, which is a general application form. And this is Exhibit C. It says, "Existing use." It's a big warehouse that's really in a warehouse district. No residences around it. It's in a fairly isolated area. And so it is a warehouse.

The proposed -- if you look to the right, it says proposed use, it says training facility. Then underneath that it says, "Project description, add indoor firing range." This was from the very beginning, your Honor. And other applications, other forms filed with the City. And attached to Defendants' opposition, there are references to firing ranges such as C-7, which is a hazardous material questionnaire.

Now, this hazardous material questionnaire is dated 2/7/08. Down at the bottom, towards the bottom it says, "Briefly describe business activities." It says, "Training facility for law enforcement." To the right it says, "Briefly describe proposed project. Build firing range." And this repeats itself in other forms filed with the City. Of course the firing range was inspected, looked at. It was approved and permitted, as were the classrooms.

Everything was fine until the May 16th memo of the City Attorney in which two issues were raised, one, that a vocational school cannot exist in this Otay Mesa redevelopment area, and number two, that you can't have a firing range without going through a laborious process. It's discretionary, and you have to go through the California Environmental Quality Act procedures, a very long drawn-out procedure.

This is the first time this has ever come up. Nobody in the City had ever brought it up. And we have set forth in our points and authorities, your Honor, and cited the Court to, number one, a vocational school is permitted. It's zoned for vocational schools. Vocational schools exist there. And the Municipal Code sections that we have cited set forth that what is allowed in the zone, specifically vocational schools, they are permitted.

It should be a nonissue. The vocational schools are permitted in that area because it's zoned for it, and the Municipal Code allows for it.

THE COURT: And their opposition doesn't really raise that issue.

MR. NEIL: It really -- it really doesn't. I mean, it's referred to, but it really doesn't.

The firing range issue has been abandoned. What was raised in the memo of the City Attorney of May 16th is no longer an issue.

So what --

THE COURT: And I think in your papers you point out two other firing ranges never went through any discretionary review process.

MR. NEIL: You know, I find it somewhat ironic too, your Honor. Those of us who live here in San Diego -- and I pointed out to one of my colleagues who came down from L.A., right in the heart of our city we have a police firing range. And if anybody is out there in that area during the day, they'd think a gun battle is going on somewhere because of all the shooting. But that's neither here nor there, but it is slightly ironic.

Now, we never thought there was anything else remaining after May 16th until suddenly there was a request on or about May 23rd from the City. And I believe it was from the chief building officer -- and that was Ms. Amate -- that we needed a permit for the mockup. Okay. We need a permit for the mockup. We didn't get this until May 23rd. We actually applied for it on May 28th and we were rebuffed. They would not accept the plans on that day, two days ago.

And Mr. -- our general contractor, who is present here in the courtroom, was down there. He was given the complete runaround, received a phone call that night from Ms. Amate saying, come on back down and turn in the plans again. He'd never had this happen before. They accept plans.

And the next day they accepted the plans on a 10-day express passage -- package to get approved within 10 days. There will be no problem with getting that approved. Our general contractor has been assured there's nothing in this mockup. It's a kid -- kind of a grown-up kid's mockup. It's a bunch of blocks together, and the only moving parts -- it's not even a simulator. Calling it a simulator almost gives it too much credence as like a flight simulator or something like that, and it's not that. It's just walls and a few doors and a couple of stairwells for sailors to climb up or to walk through.

Now, so that was the process. And then after --

THE COURT: That's in process. That's in process.

MR. NEIL: Yes.

THE COURT: That's on track.

MR. NEIL: It is.

THE COURT: As far as you know. But that's not a deterrent to a certificate of occupancy; is that right?

MR. NEIL: That is absolutely our position, your Honor. We have -- as a matter of fact, in Exhibit U, which is attached to our complaint, your Honor, if you're looking down in the lower right-hand corner, a certificate of occupancy was signed on April 30th, '08 by an individual whose name is a little difficult to decipher, but --

THE COURT: It kind of looks like Aguirre.

MR. NEIL: It did. It actually did. When I first looked at it, your Honor, it actually did.

MR. McGRATH: It's the building Aguirre. There's an Aguirre over there also, your Honor.

THE COURT: It is -- it is Aguirre.

MR. McGRATH: We're everywhere.

THE COURT: It looks like Aguirre, but it's -- so it is an Aguirre, but it's a different Aguirre.

MR. McGRATH: Yes, your Honor.

MR. NEIL: Yes.

THE COURT: All right. Thank you. What's his first name?

MR. NEIL: I don't know. I saw it in some of the pleadings.

Well, then of course, crossing in the mail on May 19th, despite our letter of the same date setting forth what we believe to be the correct law and countering the allegations made in the City Attorney's memo of May 16th was the letter from Kelly Broughton (phonetic) saying that our certificate of occupancy would not be issued.

I will represent to the Court that it is -- that is nothing more at this point in time than an act that must be performed. That must be performed. Because we have met all of the permitting requirements that we were asked to do up through and including that time.

THE COURT: What do you say to -- the City's main response is they're concerned about who is the applicant and whether -- whether the correct people were applying for the permits and other things along that line.

MR. NEIL: Well, you know, that's an interesting point, your Honor, because when a warehouse or a home or whatever is going to be remodeled, it's always the general contractor that goes down and gets the permits. And I don't know if your Honor has ever had that wonderful experience of having a home remodeled, but you didn't have to go down there and stand in line. It's the general contractor that has to go down there and go through all the hoops. So that's what went on here.

Interestingly, at all times when -- there have been numerous inspections of this site by numerous representatives of the City. Mr. Brian Bonfinglio (phonetic) is here, who is the on-site -- I call him the manager of the site, but he has a more elegant name than that. He wore his Blackwater shirt. He always wears it. There is Blackwater handouts there. There are indications everywhere that this is a Blackwater facility. It was never hidden from anyone.

In fact, interestingly, the letter of May 19th from Kelly Broughton is addressed to Blackwater. And it was not a mystery. It was just a process to go through. It's been made much more of for other reasons that we are not going to dwell on here.

THE COURT: And this facility has nothing whatsoever to do with the Potrero facility.

MR. NEIL: Absolutely.

THE COURT: I think in the news, the two get kind of muddled or people get sidetracked on thinking that this has something to do with the other -- this is an indoor firing range in a warehouse.

MR. NEIL: That's correct, your Honor. That was a very big project out there, and this is by comparison a very small project.

We have, of course, exchanged letters. We had to move expeditiously. I have been in talks with the City Attorney's Office, and I want to compliment Mr. McGrath. He's been very professional in this matter. And we have talked this out.

THE COURT: He's been in my court many times.

MR. NEIL: All right. In any event, because of the June 2nd contract date with the Navy, which if we are not able to meet that date, we will suffer, Blackwater will suffer, the United States Navy will suffer -- and I would submit, your Honor, I think the security of our nation suffers to some extent when sailors are not trained in the manner that they need to be trained. And the Navy recognizes that, and that's why they reached out to Blackwater to do this.

So we had to file this lawsuit. Didn't want to file it. And we had to then ask for the TRO because of the crush of the dates, and here we are.

I would like to just briefly address a couple of issues that were I believe raised by the Defendant City. It's interesting -- interestingly, they really haven't raised any of the constitutional -- or opposed our constitutional objections to what they have done because we are on firm ground, and there's no question in my mind that constitutionally we are being deprived of what is essentially our right to go forward with this training on June 2nd pursuant to not only federal law, but the state law that applies.

Because the main case on this is this Thompson case that we cited. It says, hey, if you've met all the permitting requirements and the only thing remaining is the occupancy permit, the City has to issue the occupancy permit.

THE COURT: There's a Ninth Circuit case Parks that assists in that regard as well. It was on the constitutional grounds. Although maybe one of the things I was thinking of is does the Court really even need -- so one approach is, if you get it under the City, State zoning and permitting laws, do you really need the constitutional issue to be addressed by the Court. But I do think Parks helps you in the Ninth Circuit.

MR. NEIL: I do, your Honor. But I would agree, I don't think we need to reach the constitutional issues. It's much more of just a factual matter on what actually occurred here in this case.

Now, I will submit that the concern that I saw in the City Attorney's response to our opposition to our TRO request was that we don't have a permit for the mockup. Your Honor, we do not need to use that mockup. As a matter of fact, at this point in time we have it all closed off with sticker tape saying don't enter like a police scene that they don't want anybody to go in.

And we're not going to use it. And I'll represent to the Court we will not use it. And if necessary, it has to be a condition to any order that the Court issues. We will fully comply with it, and we will stipulate to it. But we need to go forward otherwise with the training of the sailors on June 2nd.

And we believe that we're in the proper forum, your Honor. You certainly have jurisdiction over this case. I think that issue is somewhat frivolous. This is really what the Federal Courts are for. We are an out-of-state corporation coming in here attempting to just conduct business such as any local business would want to do.

This is -- perhaps we are perceived by some members of the population as a symbol of something they don't like, but an unpopular entity in some people's eyes is being discriminated against also. This certainly lends another reason why the Federal Court is the proper forum. And there's certainly diversity here.

Your Honor, I don't know if the Court has any questions for me. There were other matters that I was going to touch on, but in light of the Court's comments, I might now just simply defer to the City Attorney.

THE COURT: You could reserve your time.

MR. NEIL: All right.

THE COURT: And then we'll hear from Mr. McGrath.

MR. NEIL: Thank you, your Honor.

MR. McGRATH: Your Honor, the reason I've been so courteous is it's difficult for a simple lieutenant such as myself to face a general in the Marine Corps. And I've tried to be dignified throughout, given that shortcoming I have.

Your Honor, we have --

THE COURT: But normally you are dignified as well.

MR. McGRATH: Thank you. I hope.

Your Honor, I listened to Mr. Neil's comments. We totally object to the jurisdiction of this Court. It gets very confusing to go down the permit road and then to go down the Federal Court road. But let me do my best.

Blackwater is diverse. Fine. Is Blackwater injured? No. There's no injury to Blackwater by us. We dealt with somebody called Southwest and somebody called Raven. So no jurisdiction. No 1983 injury.

THE COURT: What about your own Municipal Code that permits anyone -- all of the entities that applied have the legal right to apply for the permit. San Diego Municipal Code 112.010283.

MR. McGRATH: I have no problem. Again, I say, your Honor, that's where you get confused. I get confused. That's for the permit issue. To be in front of you, we've got to have diversity. We've got diversity. We have to have a federal issue. And there is no federal issue in that Blackwater has not been injured. So that's the difference between that and the permit issue.

THE COURT: But what if they are going to take over or participate in the training as a lessee or something else?

MR. McGRATH: Plead it. They sued everybody on our team. Plead it. Have Southwest be a plaintiff. Have Raven or whoever it is be a plaintiff. Fine by me. But --

THE COURT: What about their declarations by -- and it's a declaration under oath by Mr. Brian Bonfinglio that says that they are overseeing the location and permitting and approval process for Blackwater San Diego Otay Mesa facility.

MR. McGRATH: That's not in their pleading. It's not in their complaint. There's no link to it. Again, the permit is the permit. The federal question is a federal question. Why are we here? And that's what I don't know.

This is a State Court issue in your courts, the Federal Courts.

THE COURT: Diversity -- you can have State Court issues on diversity that can come in.

MR. McGRATH: What's the injury?

THE COURT: They say that they're not going to be able to open training.

MR. McGRATH: But they is not -- again, that they is not plead in this case. Had they put that name in the pleading -- they just jumped to the conclusion that Blackwater was injured, and yet --

THE COURT: But they have it in their declaration as part of the request for a temporary restraining order.

MR. McGRATH: Well, that's a good one. Let's go to that, your Honor. The temporary restraining order wants to say that Broughton is hereby enjoined from enforcing his May 19th, 2008 letter, purportedly refusing to issue a certificate of occupancy for the property.

This Court doesn't have jurisdiction to issue such an order.

THE COURT: Sure I do.

MR. McGRATH: No, you don't, your Honor. This is a mandamus procedure.

THE COURT: The mandamus -- there's 1983 claims entirely. They don't have to be --

MR. McGRATH: Where is the 1983 harm to Blackwater? They say it, but where is it? It's not alleged anywhere.

THE COURT: There's -- under Parks. It's a property interest. You're denying them a property interest, and therefore there is 1983 jurisdiction. They're not -- they may choose and elect to go through the State Court mandamus process, but they don't -- they do not have to.

In certain contexts, the Federal Government has said -- Congress has said in 1983, we require an exhaustion of administrative remedies. Our most common case in that regard are prisoners who are in state facilities that sue, and we require through congressional action some exhaustion of administrative remedies. There's no such requirement in the property interest context.

So I think if you look at the Ninth Circuit case of Parks or Park cited in the Plaintiff's papers, I think that addresses any court's concern on the jurisdictional grounds. I do want to look at the complaint, though, on your argument about whether or not they've alleged an injury.

MR. McGRATH: Because Southwest and Raven are not mentioned. But if you -- if you choose federal cases, your Honor, the Supreme Court case of Berman vs. Parker, 348 U.S. 26 at 32, it says:

"In such cases, the legislator, not the judiciary" -- "legislature, not the judiciary, is the main guardian of the public need to be served by social legislation, whether it be Congress legislating concerning the District of Columbia," et cetera.

Going down on that same page:

"The role of the judiciary, in determining whether that power is being exercised for a public purpose, is an extremely narrow one."

Further going down:

"We do not sit to determine whether a particular housing project is or is not desirable. The concept of public welfare is broad and inclusive."

Your courts, your Honor, the Federal Courts over and over and over say this is an ever expanding area not for judicial -- especially judicial -- federal judicial meddling. We have an excellent process in the State Courts. Even in the State Courts they haven't exhausted their administrative remedies. They're at the very start.

They still have this one permit hanging out, and yet they tell us they're going to be a training facility, and there's no -- there's never been a request that I know of, your Honor, for training. There's no permit to train. Because that's a little different ball game. There's got to be exit, egress. There's all sorts of things that occur.

THE COURT: Then why did the City in Exhibit U -- Mr. Aguirre of the City sign off certificate of occupancy 4/30?

MR. McGRATH: He's just -- he's a building inspector. He signs off and says, you go ahead and do that if you want within the exercise of your discretion. But that's up to Mr. Broughton and the other folks down at City Hall as to whether that discretion would be exercised.

THE COURT: Remember, it's under the -- it's under the label "final inspection."

MR. McGRATH: Yeah. He's --

THE COURT: So on the other hand, you have them go all the way through the permitting process, make all the necessary repairs, alterations, electrical, everything else, have the final inspection. The final inspector signs off saying there's supposed to be a certificate of occupancy, and then somebody refuses to give it.

MR. McGRATH: But he's at a low level. He goes back to the headquarters. They put all those other permits together. Do we have fire escapes. Do we have what we need.

Again, Mr. Aguirre -- that Mr. Aguirre -- look at the totality of the square footage in Exhibit U. Five thousand square feet. That's not the whole premises. He's only looking at a very small area.

I go to the next point, your Honor, of irreparable harm. There is no irreparable harm. Federal case or legend on this, the best one, Los Angeles Memorial Coliseum Commission vs. National Football League. As you remember, there were a lot of allegations there of irreparable harm.

It says:

> "The court identified the alleged injury to the coliseum in the absence of an injunction as lost revenues due to its failure to acquire an NFL team."

And then it goes on:

> "The temporary loss of income ultimately to be recovered does not usually constitute irreparable injury. The key word is the consideration of irreparable. Mere injuries, however substantial in terms of money, time and energy necessary expended are not enough. The possibility that an adequate compensatory or other corrective relief will be available at a

later date in the ordinary course of litigation weighs heavily against a claim of irreparable harm."

And here they come to you the day -- you know, last week the man came in for the modular permit, and then they come in and say to you -- they give me 24 hours to brief. It was nice talking to your people from the baseball game yesterday, but I got my brief done and I'm not complaining.

THE COURT: What people -- oh, you mean you were at the baseball game. I had tickets, but I was in court.

MR. McGRATH: Well, I didn't come with mustard on me. I've made that mistake. But anyway --

THE COURT: Well, let me just explain on that. We were originally set for Monday because we had a criminal trial on Tuesday. And then our trial here turned out that -- we had been in trial a long time. That one ended up finishing so that we thought we could -- on a Monday, it's just -- we've got a lot of cases going on Monday. So I thought we would give you the whole afternoon if you needed to.

MR. McGRATH: No problem. I had my paperwork all ready to go in the 24-hour period anyway. I think we did a good job on that.

THE COURT: And Mr. Chung helped you.

MR. McGRATH: He probably did.

MR. CHUNG: Mostly Mr. McGrath, your Honor.

MR. McGRATH: Ever so slightly.

To go on in the Coliseum case, it says:

"The amended complaint alleged that without injunctive relief, the Commission would suffer a diminution of revenues, a diminution of the market value of plaintiff's property and the loss of substantial goodwill normally attached to a profitable enterprise. In support of its motion, the Commission argued that without a preliminary injunction, it would be unable to enter into a lease agreement, begin renovations, obtain financing, renovations or respond to the Raiders' alleged demand for a nonrefundable advance. All of these are but monetary injuries which could be remedied."

And I was saying before I commented on the baseball, Mr. Neil is the one that's telling you now that June 2nd or whatever it is is the date. That's a self-imposed date. Regardless of what he says it is or isn't, it's still only money. There's no -- no damage here that's irreparable for an injunction.

THE COURT: You don't buy this training public interest argument?

MR. McGRATH: No. Sorry. I will tell you what I'd buy. If they had done it right and said, we're Blackwater. We're here to train these guys who unfortunately let the Stark (phonetic) get blown up because they didn't know how to use rifles and so forth, which is a great idea, and we're here and we're going to do it out in Otay Mesa and we're going to have a pistol range and we're going to have them crawling up ships so they don't trip and shoot themselves -- which when I was in the Army, we learned to do that, but they don't teach that in the Navy, so they hire Blackwater.

Fine and dandy. Say what you're here for. Don't tell me you're Southwest when there's a Southwestern school next door that has a similar program. Don't tell me you're Raven, which is nowhere in any of the pleadings.

THE COURT: But isn't it very common for contractors to come in on a facility? That's very common.

MR. McGRATH: I say this whole process flunks the smell test. When you sit and take the time to go through each one of these permits that are kind of disjointed and --

THE COURT: Are we picking and choosing because you don't like the name of Blackwater?

MR. McGRATH: No, we're not.

THE COURT: If that is the case --

MR. McGRATH: That is not the issue.

THE COURT: So you love Blackwater.

MR. McGRATH: I love Blackwater.

THE COURT: Okay. So the fact that it's Blackwater applying for this has nothing to do with the denial of the certificate of occupancy?

MR. McGRATH: No. No. It's the totality of the circumstances of what is going on out in Otay.

THE COURT: So are you saying that every -- every permit has to be in the name of the ultimate end user?

MR. McGRATH: No, it does not. But the whole setup could have been applied for together. They do --

THE COURT: But they don't have -- you mean -- you're saying the simulator and everything else?

MR. McGRATH: They did -- first they did, can we put up some walls and so forth. Then they did, can we have a shooting range. And now they put in for a simulator which they call a ride. It's not a ride. You know, tell us why you're here.

That's why this red flag came up. Wait a minute. Overall, each little individual permit may have been okay per the little inspectors that get out there and do their best and knock on the walls and so forth. But when you put it all together, we're talking major baseball league -- major league training out there, your Honor.

THE COURT: In an indoor warehouse facility in the --

MR. McGRATH: With a climbing up --

THE COURT: -- middle of Otay Mesa.

MR. McGRATH: Climbing up a ship built -- which they build out there. It's fairly substantial. It looks just like the ship. It looks like --

THE COURT: But it's indoors, isn't it?

MR. McGRATH: Yeah, but it's a ship bulkhead. And there's a lot of classrooms around. There's a -- you know, there's training going on. That issue, that particular thing was not applied for. There was never any application for a training facility. Never was.

Mr. Neil says it's a vocational institute. Again, another -- if it is, tell us it is. Tell us --

THE COURT: But it's zoned that way.

MR. McGRATH: If it's zoned for a hotel, you've still got to tell us you've building a hotel before you build one. You're supposed to come down and say what you're -- Hyatt can't just go out tomorrow and start whamming nails in because it says they're going to have a hotel out there. That's our point.

Let me go on, your Honor. The discretion issue under California law. It's called Lindel vs. Board of Permit Appeals (phonetic), 23 Cal.2d 303. They can't compel Broughton to act. They just can't do it through the TRO process. It doesn't work that way.

THE COURT: Maybe they want to risk contempt.

MR. McGRATH: Say what?

THE COURT: Maybe Broughton wants to risk contempt. I mean, that's your alternative.

MR. McGRATH: I missed it. Risk what?

THE COURT: Contempt or a stay, absent a stay. I mean, how can you say you can't compel?

MR. McGRATH: Well, I'll just read you what the case says at page 315:

> "It is general rule that a writ of mandamus may not be employed to compel a public administrative agency possessing discretionary power to act in a particular manner."

THE COURT: Okay. But doesn't that beg the question, is this discretionary review or is it ministerial review of the --

MR. McGRATH: And it's discretionary now. As Broughton's memo says, once he looked at everything, his discretion came into play. What they check off -- they put the word "ministerial" in when they do their walls and their electrical and that sort of thing.

THE COURT: When there was the indoor firing range on Morena next to a -- and I think there was a trailer park and there was a paint store, did they do a discretionary review process or a ministerial review process? I don't think they did the discretionary review level three.

MR. McGRATH: I wasn't there.

THE COURT: Well, they cited it in their papers.

MR. McGRATH: I don't know what happened there, but --

THE COURT: Well, have you asked your -- the rest of the folks at the City Attorney about what happened on the other firing range. So we look at comparable firing ranges, what happened there. They cite in their papers that they weren't made to go through any discretionary review process.

MR. McGRATH: But it's not just the firing range. It's the firing range which are put next to the classrooms, put next to the ladders and the -- you actually have a bulkhead, you know, like the Navy does that you have to step over. And you climb these ladders to be sure you don't, you know, incorrectly use your weapon or catch it on a button and make it fire. It's that whole concept of the training that is not described. It's little bits and pieces of permits.

So Broughton came along, and when he looked at the whole picture said, in my discretion, I've got to look at this. I want to stop it for now. And that's what he did. The case I just cited again goes on to say:

"The Court may not substitute its discretion for the discretion properly vested in the administrative agency."

And that was again, your Honor, Lindel vs. Board of Permit Appeals, 23 Cal.2d 303.

So you can't compel Broughton to act, and you can't substitute your Honor's thought process for his. That's his job. He's the guy that does discretion.

Going on, your Honor, in Burnham Prairie Homes, Incorporated vs. Burnham -- New Burnham Prairie Homes vs. The Village of Burnham, 910 F.2d 1474:

"Land owners and developers could not assert procedural due process claim under 1983 arising out of a denial of a building permit inasmuch as Illinois law provided unsuccessful applicants for building permits with sufficient state remedy to cure the sort of random and unauthorized denial of which the developer and the land owners now complained."

And that's where I got my 1983. I haven't seen your case that you cited, but that's where I picked it up.

THE COURT: In Parks vs. Watson, 713 F.2d 646, Ninth Circuit 1993:

> "The Oregon statute specified that in ruling on a particular petition, the agency shall determine three issues and if those three matters were determined in favor of the petition, the governing body shall grant the petition. In other words, once the conditions are met, the City lacks discretionary powers."
>
> Parks, 716 F.2d at 657.

So if the petitioner met the conditions, but was denied the petition, the court there held that the petitioner could bring a due process claim under 42 United States Code Section 1983.

MR. McGRATH: Factually, I don't know that case, that it had as many permits as we did, as many inspections, as many different things being requested over time.

THE COURT: Can you give me any of the City inspections where they were denied?

MR. McGRATH: Who?

THE COURT: Your own City inspectors going through final inspection where they said, no, something is missing.

MR. McGRATH: No, because they did it piecemeal.

They didn't ever do the training facility. They told us they were -- what was it -- warehouse use, no change. Warehouse use, no change. How many times do you see that, your Honor, in those --

THE COURT: But that's not correct. It says training facility.

MR. McGRATH: At the very end they use that word for the first time.

THE COURT: I think it's in March.

MR. McGRATH: But early on --

THE COURT: That's not the very end. And then after that, you still have the sign-off of your building inspector.

MR. McGRATH: Again, Raven and so forth that were doing electrical, drywall, et cetera, no change, no change, no change. Now we have a total change. And again, I have a hard time with Mr. Neil's statement that they don't care, they just want a firing range. Well, that's not at all in compliance with the contract with the Navy. The Navy wants them to train these young people how to walk with a weapon up a ladder and not hurt himself or herself.

How to shoot is very important. And their range will take care of that part. But the next step of the Navy contracts that they have here and back east are the overall process. So I question that, why he would say that's good enough. But if he says it, he says it.

I go on, your Honor, with more federal law. In Santa Fe Land Improvement Company, United States Court of Appeals, Ninth Circuit, vs. City of Chula Vista, 596 F.2d 838. The court in that case says:

"The complaint touches on a sensitive area of social policy upon which the Federal Courts ought not to enter unless no alternative to its adjudication is open."

And that's at 839 of that decision.

Going on on the same page:

"In Sedercrist (phonetic) and Rancho Palos Verdes, we stated that land use planning is today a sensitive area of social policy, meeting the first Canton requirement.

The Canton case that cited how that's --

THE COURT: So your social policy concern is the Federal Government contracting out with an outside entity to provide training for sailors, and you're opposed to that on public policy grounds?

MR. McGRATH: No. I do not -- you won't get me to say I'm opposed to that at all.

THE COURT: So what is this --

MR. McGRATH: I'm saying the social policy is the issuing of permits, the normal day-to-day business that cities do, not federal judges.

THE COURT: Now, that -- that is -- I understand that typically the Court would not get involved in permitting issues, nor would the Court say every time some homeowner is denied a permit would I envision that they can run down to Federal Court and get a TRO. So I understand your point in that regard.

But in this case, I think that the Plaintiff may have shown that they have complied with the City permitting. So this is why I'm asking you, show me where they haven't. You've brought up the simulator, and that may be one issue that we could address, but what other thing have they not done?

MR. McGRATH: They haven't put the whole thing together. They've just got little pieces of that warehouse. Mr. Aguirre --

THE COURT: Where does it say that you have to put it all together?

MR. McGRATH: Mr. Aguirre does 5,000 square feet. It's a 50,000-square-foot --

THE COURT: Okay. But there are other permits as well. I mean, there are other sign-offs as well.

MR. McGRATH: Well, the -- Raven, whoever they are, did drywall and something else, electric, I think.

THE COURT: Footings, masonry, roof, drywall --

MR. McGRATH: Does that say for training? Does it say for, you know -- I don't think so. They don't ever give us the big picture of what they're there for. We need to then look at -- training means lots of bodies. You can have a shooting range and there's nobody in it. But we're talking about being sure there's fire exits and OSHA and -- you know, I won't go so far as to say disabled and so forth with the bulkhead at issue, but there are things that need to be checked off on the totality of this request. That's where we're coming from, your Honor.

THE COURT: The application says training enterprises. Why would you not think that -- that's the first application.

MR. McGRATH: But where -- where is that on? Which application do you have that on, your Honor?

THE COURT: 9/5/07, application for tenant improvements by Southwest Law Enforcement Training Enterprises.

MR. McGRATH: That's the first time they've put that in there. Before it was always warehouse, no change. That's Raven.

Your Honor, I go on to say --

THE COURT: So what about the -- so with the general -- so if you look at the documents, the general one dated -- here's one, general 3/15/08. But the hazardous materials questionnaire dated way back 9/5/07 says, "Storage of ammo, law enforcement training."

MR. McGRATH: Is this law enforcement?

THE COURT: Then February 7th, the electrical and T.I. was all approved. "Training facility at indoor firing range." So how could the City -- and that's dated -- it's your -- it's on my -- if you're looking at my documents, the top header. I don't know if you have this, but on -- it's page 18 of 26, Exhibit C. And these are, I believe, from you.

MR. McGRATH: Their Exhibit C to their motion or their complaint?

MR. NEIL: It's your -- it's the declaration of Amate I believe you're referring to, your Honor.

THE COURT: The general application. Training -- it says, "Proposed use, training facility."

MR. NEIL: Yes.

THE COURT: So your main point is the Federal Government should not get involved in issuing building permits.

MR. McGRATH: You bet. And also, there's a -- we have a tremendous system there that hasn't even started to be touched with -- you know, the end result is mandamus. I think, you know, if I could predict something -- and I don't know that I'm good at that, but this goes to planning. Planning gets to look at it. Planning says fine, it's done. Or if planning says no, then it would go to the City Council, and the issue would be brought to the Council's attention in full form. If planning didn't rule such as there would be an appeal -- full appeal to Council.

And that is my point. There's no 1983. There's no federal claim at all. There's a company, Blackwater, who doesn't live here, but they don't have any injury. That's my point. They're good on their permit part of Blackwater, but they're not good on the Federal Court.

So they're not constitutionally injured. I mean, why do we have State Courts if you can just come over here every time something doesn't go too well for you.

THE COURT: Diversity.

MR. McGRATH: Ahh, but diversity with injury.

THE COURT: You have to be out of state.

MR. McGRATH: And irreparable harm. Money. Money. Money is not irreparable harm.

THE COURT: All right. Thank you.

MR. McGRATH: Thank you, your Honor.

THE COURT: Let me ask Mr. Neil, can you get out the complaint and say where is there the nexus between Blackwater and the injury or Blackwater and Raven

Development Group.

MR. NEIL: Yes, your Honor. Thank you.

In the complaint, your Honor, we start at -- we describe who Blackwater is starting at paragraph 19, page six, and discussing Blackwater's contract with the United States Navy. And then over at -- starting at paragraph 25, we discussed the site that was chosen. And then at paragraph 26 it says, "Initially, Blackwater hoped to work with Southwest Law Enforcement Training Enterprises. This was a contractor that we hoped to work with." And initially Southwest Law Enforcement Training Enterprises, who I'll represent to the Court is someone that Blackwater has worked with in the past, and they're a good outfit, and they're involved with training also. But that -- they could never reach a final agreement as to how the work was to be shared and how it was to be done.

And at paragraph 30 of the complaint, page nine, Blackwater -- it describes Blackwater's affiliate, Raven Development Group. And by the way, Raven Development Group, your Honor, was the same -- was involved in the Potrero project and is a well known entity. And this specializes -- Raven Development specializes in the creation of training facilities, and they assisted Blackwater with its construction of and preparations for the Otay Mesa facility. That's described in paragraph 30.

And then it goes on to paragraph 31 to talk about Blackwater being required to do certain things, et cetera. That, I believe, describes the nexus between Southwest, Raven and Blackwater. Raven and Southwest were essentially acting as a contractor for Blackwater.

And as the Court has already pointed out, this never was a mystery to the City because even the Mayor -- what was the exhibit number of the Mayor -- there was a memo from the Mayor that the -- there's a memo dated, I believe, May 5th from the Mayor that describes Blackwater. Then, of course -- Exhibit F. The Mayor was aware that this facility was going to be operated by Blackwater.

And Mr. Aguirre addresses Blackwater in his May 16th memo. And of course, Kelly Broughton in her letter back addresses Blackwater and --

MR. NADOLENCO: He. He's a he.

MR. NEIL: I mean he. I'm sorry about that. My apologies.

In any event, this was not a mystery. I'm not sure if that satisfies the Court's questions in that regard, but let me just hit on a couple of other points, and then I'm going to sit down, your Honor, unless your Honor has some questions for me.

The issue about no injury, the Ninth Circuit has decided that the loss of money, of course, is an injury.

And I don't think that needs to be beat to death. We don't want to have to get into the business of suing the City. I think the last thing the City of San Diego needs right now is another lawsuit for a lot of money that's lost on a contract. Nobody wants to go there.

And Blackwater stands to lose this contract and lose a considerable amount of money, as well as the Navy and our sailors, our fighting men and women losing the training that they deserve.

Now, in all deference to my opposing counsel's argument upon the issue of the Court not being able to interfere in discretionary duties of the City, we would agree with that. And the cases he cited all had to do with discretionary duties of the City. And we're talking about a ministerial -- a ministerial duty. And the case law is clear on that. This is not a matter of discretion at this point in time. The case is clear. And the cases that counsel is citing did not deal with this discretionary issue that we're talking about.

THE COURT: Other than -- other than the simulator, is there any other permit that you're lacking?

MR. NEIL: No. No. We're completely permitted.

THE COURT: And you have complete approval from all of the --

MR. NEIL: Yes.

THE COURT: -- all of the inspectors?

MR. NEIL: Yes.

THE COURT: And so you're saying that the head development services person doesn't have discretion to then nevertheless say, even though you have these approvals, I'm not going to issue a permit without going through to the City Council?

MR. NEIL: Yes. And I think Thompson makes that clear, your Honor.

Your Honor, I would cite the Court also to -- there's the declaration of Ms. Amate at, for example, the last exhibit before Exhibit B at the top. This is the City's form. If you look up there at the top left, it says, "Project type." It says, "Ministerial." Do you see where it's typed in that box?

THE COURT: Show me. This is Exhibit C?

MR. NEIL: This actually is Exhibit A, but it's the last exhibit in Exhibit A right before Exhibit B. There was a number of exhibits under Exhibit A. But it's the very last one. It's kind of a block form, a computer type form.

THE COURT: In Ms. Amate's declaration?

MR. NEIL: Yes, your Honor.

THE COURT: Let me first find that. Okay. I've got that.

MR. McGRATH: Does it have an exhibit number on it?

MR. NEIL: Yes. It doesn't have a separate page number on it.

THE COURT: My pages are numbered. Are your pages numbered at the very top or not? Pardon me?

MR. NADOLENCO: A-9.

MR. NEIL: Okay. It's A-9? I'll accept that. I can't read it on my copy. But if the Court has that, up in the left-hand corner, there's a box that says, "Project type," and typed in there by the City is the word "ministerial."

THE COURT: Can you approach my clerk --

MR. NEIL: Yes, your Honor, if I may.

THE COURT: -- and just -- and then I'll see where we are.

MR. NEIL: This is the one on -- your Honor, that also says "Storage of ammo" on it. In the upper left-hand corner it says "ministerial."

THE COURT: Okay.

MR. NEIL: And there's one more, if I may just remain here, your Honor. And maybe counsel can help me. This is Exhibit B-5. It's the last exhibit before C.

THE COURT: First on the -- oh, I see where it says, "Project type, ministerial."

MR. NEIL: Yes. And the same wording up here, your Honor, on Exhibit B-5 in Ms. Amate's declaration on a separate form. Same format, but up in the upper left-hand corner it again says "ministerial." "Project type, ministerial."

THE COURT: Thank you.

MR. NEIL: Your Honor, the Municipal Code Section 129.0114 which deals with issuance of a certificate of occupancy states that:

> "The building officials shall inspect the structure, and if the building official finds no violations of the Land Development Code or other regulations that are enforced by the City's designated code enforcement officials, the building officials shall issue a certificate of occupancy."

This shows the legal effect of the signature of the inspector who signed off on Exhibit U attached to our complaint, your Honor.

Now, having said all of this, your Honor, we feel that this -- well, obviously, Blackwater has a vested interest. And speaking for myself at this time in our country's history, we are not talking about anything of an offensive nature. Blackwater is not involved down at Otay Mesa in teaching how to invade another country or anything else. We are simply in the self-defense business and teaching our men and women, sailors of our armed forces how to protect themselves and protect our ships.

There is some urgency to this. The USS Kohl was bombed and 17 lives were lost in part perhaps to the fact that the sailors were not properly trained. And at least the United States Navy believes that their sailors need to be further trained in self defense, and they think enough of Blackwater to hire Blackwater to carry out this mission to help save lives. And that's really bottom line what we're talking about.

And I would ask the Court to comply with our request and to issue the temporary restraining order as requested and allow us to begin our training of the United States Navy sailors on June 2nd, as we have been contracted to do and that the Navy expects us to do.

THE COURT: Could you address the amount of a bond.

MR. NEIL: You know, I've never had to do this, your Honor. Again, quite honestly. I've heard this brought up a little bit, and I almost have to ask one of my co-counsel here what I think --

THE COURT: You may. You may. Would you like one of your co-counsels to address the amount of the bond?

MR. NEIL: Well, I think if he would like to do so, he is more than welcome to get up here and talk about that.

MR. NADOLENCO: I would, your Honor. John Nadolenco.

Here there is no harm. There is no potential damage to the City. They don't even claim otherwise in their paper. We've made that point in the balance of the hardships argument. So there's a good argument that a bond is not needed at all whatsoever. However, if the Court is inclined to impose one, it should be in a modest amount of $250 we put in the proposed order.

THE COURT: Thank you.

Mr. McGrath, any response on the issue of the bond?

MR. McGRATH: Yes, your Honor. I would like to quickly respond to what Mr. Neil did. Everything he did with Amate, B-7, B-9, et cetera, where it says "ministerial," those were partitions and electrical work, which is ministerial.

The key in this case is the Exhibit D to their complaint, the letter from Kelly Broughton to Brian Bonfinglio, who I met and is a fine former Marine or still a Marine. Always a Marine. He says:

"As outlined in the attached opinion from the City Attorney's Office, no certificate of occupancy will be issued until the appropriate discretionary process associated with the use of firearms and City limits and determination of use for vocational trade school by the Planning Commission has been completed."

Again, tying it all together, firearms school. That process has yet to be completed. And that should stop it all. We've got a fine system over there. I don't think they're going to see the end of the world from our system. I do think it's a bad precedent for this Court to get involved in State Court issues.

I have had a chance to look at their statement of what Parks said. In Parks, they did all their permits. They were all done. Everything was fine. We say they're not through yet as to what the totality of what they want, training facility with guns. Thank you, your Honor.

THE COURT: Thank you.

MR. McGRATH: And the bond should be at least 5 million. We're going to get sued by everybody in that neighborhood out there if we don't do it correctly.

THE COURT: All right. Thank you.

Before the Court is the issuance of a temporary restraining order. The Court concludes that it does have

Federal Court jurisdiction and that the Plaintiffs have shown the necessity for the issuance of injunctive relief. The Court will take the matter, though, under submission and issue a written opinion. And the Court's opinion will probably come out on June 3.

And I think that that timing is preferable to the Court. I don't think that that's going to pose an irreparable problem for you.

MR. NEIL: That does not, your Honor. Thank you.

THE COURT: And then I want to study the issuance -- the amount of the bond. I'm not inclined to do $5 million. The purpose is not to -- is not on that. If they're -- if they've met the requirements for the permits, it's zoned vocational. No other firing range had to go through a discretionary review process.

The Morena facility is closer to residential use than this facility in Otay Mesa. I think that what's happening here is more people take a look at the name Blackwater, and then that just evokes on certain side one set of feelings, on another side another set of feelings. That's not the Court's review. The Court's review is purely under the law.

MR. NEIL: Thank you.

THE COURT: And the Court has reviewed the excellent papers by both sides and then ultimately has to make the decision.

Then for purposes of a hearing, if the Court does issue a temporary restraining order, then it expires within 10 days unless extended for good cause by the Court. So probably I would hold a hearing if the parties are -- and I would set then a briefing schedule for June 17th if that will work with your schedules. Will that be sufficient?

MR. NEIL: Yes, your Honor.

MR. McGRATH: Your Honor, may we also have -- I've been waiting because I wasn't sure of the outcome here. Could we also have a hearing for a 12(b)(6) motion and a request for you to abstain on that same day, which would be ripe?

THE COURT: On -- abstention was not raised in your papers under any --

MR. McGRATH: Well, no. I would like to bring that motion that day.

THE COURT: Well, for a --

MR. NEIL: I think it's waived, your Honor.

THE COURT: For your 12(b)(6) motion on a motion to dismiss, you have to call in for a hearing date.

MR. McGRATH: I just was here. I thought I'd ask. And it's the 7th.

THE COURT: A motion to dismiss is 28 days notice. So that's -- and so then you'll have to get in line on the

Court's calendar. On the abstention -- I'm going to give you a briefing schedule in the written order for the preliminary injunction.

MR. McGRATH: Okay. Your Honor, I maintain that if you -- if you -- if we don't get a hearing to say you do not have jurisdiction and you do issue whatever type of injunction and you don't have jurisdiction, then I think I have brought up the abstention issue, whether I like it or not.

THE COURT: Well, I set a written briefing schedule. There was no request for abstention under any State Court abstention.

MR. McGRATH: Again, remember I had 24 hours to brief. I did my best.

THE COURT: Or here today. And so --

MR. McGRATH: Are you saying that we've waived the abstention issue?

THE COURT: I'm saying that it was not put in writing in your written submissions.

MR. McGRATH: And we will do that on the day when --

THE COURT: For a motion to dismiss, it's a 28-day schedule for a motion to dismiss.

MR. McGRATH: And that -- it would be a motion to dismiss and an abstention motion at the same time.

THE COURT: You may do that.

MR. McGRATH: That's what we'll do.

THE COURT: And then also on a preliminary -- so the hearing -- the TRO extends for 10 days unless extended for good cause by the Court. The Court -- if I issue it on June 3, then the hearing would be -- or at least I would extend it for good cause to June 17 at 10:00 o'clock. And I was just checking to see if the parties are in town.

I'm not squeezing on a motion to dismiss because that's a 28-day schedule. The 10-day schedule is set by Rule 65, and the Federal Rules that require a hearing with -- after the 10-day time. So --

MR. McGRATH: Well, could I ask for an order shortening time now for that?

THE COURT: That requires it to be in writing, and the Court would decline to put it on the same date.

MR. McGRATH: Thank you.

THE COURT: You may also, in your briefing schedule on the preliminary injunction, raise any and all appropriate defenses, including abstention.

MR. McGRATH: Thank you, your Honor.

MR. NEIL: Thank you, your Honor, for your time in getting us in here on a Friday afternoon.

THE COURT: All right. Thank you.

MR. NEIL: This was great. Thank you.

THE COURT: However, the actual order will not go out until June 3.

MR. NEIL: Understood. Thank you.

MR. NADOLENCO: Thank you, your Honor.

THE COURT: Thank you.

THE CLERK: We're in recess.

(Proceedings concluded.)

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

s/Shonna Mowrer 6/3/08
Transcriber Date

FEDERALLY CERTIFIED TRANSCRIPT AUTHENTICATED BY:

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